IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITON NO.130 OF 2005

Sahara India Commercial Corporation Ltd. ...Petitioner.

vs.

Futura Designs and Concepts Private Ltd. ...Respondent.

Mr.A.Bookwala i/b. M/s.Markand Gandhi & Co., for Petitioner.

Mr.S.C.Gupte with R.D.Dhanuka i/b. V.L.Panjwani, Respondent

CORAM: D.K.DESHMUKH,J.

DATED: 23rd November,2005

P.C.:-

1. By this petition, the petitioner challenges the Award made by the Arbitral Tribunal dated 23.12.2004. By that Award, the petitioner has been directed to pay to the respondent sum of Rs.1,33,88,072/- together with interest on Rs.1,30,15,089/-. It appears that the petitioner had entered into an agreement with the respondent dated

23.6.1999 for construction. Under that contract, the respondent had agreed to carry out the work of the design and construction of night club as per the concept drawing of the night club presented by the respondent and accepted by the petitioner. According to that contract, the work was carried out by the respondent. The disputes arose between the parties. There was an arbitration clause in the agreement dated 23.6.1999. The disputes were referred to the arbitration, before the Arbitral Tribunal the petitioner raised an objection to the jurisdiction of the Arbitral Tribunal. The objection of the petitioner was that the agreement dated 23.6.1999 had the arbitration clause but that agreement was given a go by by the parties and the parties have entered into an agreement dated 23.6.2000, and this fresh agreement dated 23.6.2000 did not have any arbitration clause and therefore, the Arbitral Tribunal has no jurisdiction to decide the dispute. The objection to the jurisdiction of the Arbitral Tribunal has been dealt with and has been decided by the Arbitral Tribunal by order dated 12.12.2002. The Arbitral Tribunal has held that the agreement dated 23.6.1999 was not given a go by and that the agreement dated 23.6.2000 merely modifies certain terms of the agreement dated 23.6.1999 and therefore, the disputes between the parties actually have arisen out of the contract dated 23.6.1999 and therefore, the Arbitral Tribunal has jurisdiction to make the Award. The Arbitral Tribunal, thereafter proceeded to consider the various

claims raised by the respondents and has made the Award on 23.12.2004. Before me the petitioner has challenged the award made by the Arbitral Tribunal against claim no.3, Claim no.5 and claim no.6.

2. So far as claim no.3 is concerned, the admitted position is that some machinery was required to be imported by the respondent for carrying out a part of the work assigned to the respondent. The respondent was not in a position for some reasons to import that machinery, whereas the petitioner was in a position to import the machinery. Therefore, the machinery was imported by the petitioner. A sum of Rs.80 lakhs was deducted by the petitioner towards the cost of the machinery from the amount that was payable to the respondent under the contract. But the petitioner did not permit the respondent to take away the machinery. The respondent therefore, claimed refund of Rs.80 lakhs. The Arbitral Tribunal has held that the respondent is entitled to the amount of Rs.80 lakhs which was deducted by the petitioner from the amount payable to the respondent under the contract.

3. The claim nos.5 and 6 are relate to some additional work carried out by the respondent. The Arbitral Tribunal has awarded an amount of Rs.17,31,261/- against the claim no.5 and has awarded an amount of Rs.11,75,000/- against the claim no.6.

4. So far as the aspect of the jurisdiction of the Arbitral Tribunal is concerned, the learned Counsel appearing for the petitioner states that the original contract dated 23.6.1999 was a turn-key contract where the entire work was to be done by the respondent. The respondent was not able to complete the work within time. Therefore, parties entered into a fresh contract dated 23.6.2000 and now this time a part of the work was to be carried out by the petitioner itself. Therefore, according to the learned Counsel, a fresh contract came into force between the parties. As the change effected in the old contract goes to the very root a new contract between the parties has come into existence. The learned Counsel submits that the Arbitral Tribunal has however, erroneously held that only certain modifications were made for the execution of balance work and no new contract came into existence between the parties. In reply, the learned Counsel appearing for the respondent submits that if the original contract dated 23.6.1999 and the subsequent minutes of the meeting dated 23.6.2000 are read together it becomes clear that the basic contract is dated 23.6.1999 wherein only some modification are made by the parties for the purpose of executing the balance work. The learned Counsel further submits that if the correspondence between the parties is perused it becomes clear that even the petitioner was treating the contract dated 23.6.1999 as subsisting and it

is for the first time after the arbitration clause was invoked that the petitioner started contending that the agreement dated 23.6.1999 does not exist. According to the learned counsel the objection raised by the petitioner is merely an afterthought. In any case, according to the learned Counsel, the view that has been taken by the learned Arbitral Tribunal is a possible view of the matter taken after considering the material on record and therefore, this Court will not be justified in disturbing the finding.

5. Perusal of the application filed by the petitioner before the Arbitral Tribunal under Section 16 of the Arbitration and Conciliation Act,1996 shows that according to the petitioner, on 23.6.2000 a new agreement came into existence between the parties and the earlier agreement was given a go by. Perusal of the minutes of the meetings dated 23.6.2000 shows that firstly a reference is made to the agreement dated 23.6.1999 between the parties. It is stated that the respondent has completed 75% of the work and has expressed its inability to carry out further work unless and until they are paid for the work that is already carried out. Then reference is made to the letter dated 21.6.2000 written by the respondent and the terms agreed between the parties pursuant to that letter are noted in the agreement. It is thus clear that this agreement is entered into by the parties in order to complete the incomplete work under the contract dated 23.6.1999 and

also to resolve the grievances of both the parties which they had against each other. This agreement also contemplates payment being made for the extra work done by the respondent on actual cost basis. In my opinion, the learned Counsel for respondent is justified in submitting that in order to find out whether the case of the petitioner that the agreement dated 23.6.1999 ceased to exist on 23.6.2000 is genuine or not, one has to look at the conduct of the petitioner. If from that point of view one peruses letter dated 18.9.2000 admittedly written by the petitioner to the respondent, it becomes clear that in this letter what is referred to as agreement between the parties is agreement dated 24.6.1999 and the document dated 23.6.2000 is merely referred to as minutes of meeting and it is not even described as agreement between the parties. It is further stated in this letter that the agreement between the parties was determined by the petitioner. Whereas the case of the petitioner in the application filed under Section 16 of the Arbitration & Conciliation Act is that the agreement dated 23.6.1999 came to an end by mutual consent of the parties and by entering into altogether new arrangement. The next letter which in my opinion is relevant is the letter dated 26.12.2000. In this letter compensation is claimed under clause 10 of the Agreement dated 23.6.1999 and there is no reference to the alleged new agreement between the parties dated 23.6.2000. Perusal of the letter dated 5.4.2001 shows that it is for the first time in that letter that the

petitioner took a stand that agreement dated 23.6.1999 was not in existence but that stand was taken only after the respondent had invoked the arbitration clause. Thus, till the arbitration clause was invoked, it does not appears to be a stand taken by the petitioner anywhere that the agreement dated 23.6.1999 ceased to exist on 23.6.2000 and therefore, there is considerable force in the submission of the learned Counsel for respondent that the plea was merely an afterthought. Considering the terms of the agreement dated 23.6.1999 and 23.6.2000 and the correspondence on record, to my mind, it appears that the finding that is recorded by the Arbitral Tribunal that by the minutes of meeting dated 23.6.2000 the original agreement dt.23.6.1999 was modified, is a possible view and therefore, it will not be appropriate for this Court to disturb that view.

4. So far as the Award made by the Arbitral Tribunal against claim no.3 is concerned, the respondent had made claim no.3 in the following terms:

> "101. Dispute/Claim No.3.
>
> The Claimants say that an amount of Rs.80 lakhs was deducted by the Respondents towards the cost of equipment which the Respondents had to fund as per the understanding with the Claimants.

The Claimants say that in view of the funding arrangements on the Claimants behalf, no mobilisation advance was paid to the Claimants by the Respondents. The Claimants say that even though the said amount of Rs.80 lakhs has already been deducted from Claimants' contract value of Rs.320 lakhs, the equipment imported by the Respondents under the EPGC scheme has not yet been transferred to the Claimants. The Claimants say that the said equipment has still not been transferred by the Respondents to the Claimants' name. The Claimants say that the Respondents are still holding the said machinery, even though the Respondents had deducted Rs.80 lakhs from the Claimants contract value on this account. The Claimants say that as the Respondents had retained the said machinery and as the Respondents have not transferred the same to the Claimants nor has the Respondents entered into an MOU for transfer of the said equipment, the Claimants are entitled to payment of the said amount of Rs.80 lakhs deducted by the Respondents on this account. The Claimants say that the Claimants had repeatedly requested the

> Respondents to enter into a MOU for transferring the said equipment to the Claimants' name. However the Respondents failed and neglected to do so and retained the said equipments in the Respondents custody, without allowing the Claimants to remove the same or utilize the same elsewhere. The Claimants say that consequently the Claimants are entitled to payment of the said amount of Rs.80 lakhs deducted by the Respondents from the contract value. The Claimants claim the said amount of Rs.80 lakhs on this account from the Respondents and pray that the learned Arbitrators may be pleased to award the same to be paid to the Claimants by the Respondents."

The claim of the respondent thus was that though Rs.80 lakhs was deducted as cost of the machinery by the petitioner but the petitioner is not giving possession of the machinery and therefore, the respondent was claiming refund of amount that was deducted from the amount that was due to the respondent under the contract. The defence of the petitioner reads as under:-

> "57. With reference to paragraph 101 of the

Statement of Claim, the Respondents deny that the Claimants are entitled to payment of the amount of Rs.80,00,000/- allegedly deducted by the Respondents towards the cost of equipment. There was no question of the Respondents agreeing to fund the cost of any equipment as it was the obligation of the Claimants to bring the equipment at site at their own cost. Having failed in that obligation and having requested on their own, the Respondents to acquire the machines, it is not open for the Claimants to now claim the machines or its cost when it is not their property. A spacious plea of an Agreement to transfer the said machines being allegedly breached by the Respondents is not tenable at all. The Respondents deny that there was any agreement to transfer the machines back to the Claimants. The very fact that the Claimants are pleading such an Agreement means that the machines are the absolute property of the Respondents and no claim can be entertained by the Claimants unless they prove their allegations completely. Each and every statement, allegation and claim in paragraph 101 is denied and the

Respondents put the Claimants to a strict proof thereof. “

Perusal of the defence shows that the petitioner has not disputed that an amount of Rs.80 lakhs was deducted from the amount payable to the respondent and it was claiming to be an owner of the machine. The Arbitral Tribunal has held that as admittedly the amount of Rs.80 lakhs has been deducted from the amount payable to the respondent and as the petitioner was not transferring the machinery in the name of respondent nor he was permitting the respondent to take away the machinery, the respondent is entitled to refund of Rs.80 lakhs. The Arbitral Tribunal has also dealt with the offer made at the time of argument on behalf of the petitioner that the respondent may be permitted to take away the machinery and has held that due to lapse of time the machinery must have became valueless and therefore, the offer is not genuine. The learned Counsel appearing for the petitioner, in so far as this claim is concerned, submits that at the stage of arguments the petitioner has accepted the position that the machinery belongs to the respondent and therefore, they had offered that the respondent be permitted to take away the machinery. But that request has been rejected by the Arbitral Tribunal by observing that due to lapse of time machinery must have become valueless. According to the learned counsel, this finding has been recorded by the Arbitral

Tribunal without there being any evidence on record. It is submitted by the learned counsel that therefore the rejection of the offer made by the petitioner before the Arbitral Tribunal, by the Arbitral Tribunal was not proper. In my opinion, considering the defence raised by the petitioner before the Arbitral Tribunal no exception can be taken to the Award made by the Arbitral Tribunal. It appears almost to be an admitted position on record that the machinery was imported by the petitioner for the work which was to be carried out by the respondent. The petitioner deducted Rs.80 lakhs from the amount that was payable to the respondent. Therefore, there was no justification whatsoever for the petitioner not to transfer the machinery to the respondent and not to permit the respondent to take away the machinery. But the petitioner without there being any justification appropriated the price of the machinery i.e. Rs.80 lakhs and also continued to retain the machinery. In the Written statement the only effective plea that was raised was that it is the petitioner who is the owner of the machinery. If the petitioner is the owner of the machinery obviously the petitioner cannot also retain the amount of Rs.80 lakhs which was paid by the respondent to the petitioner. The defence raised by the petitioner was thus totally dis-honest and it was aimed at retaining the machinery as also its price recovered from the respondent. So far as the offer made by the petitioner is concerned, admittedly that offer was made after the evidence was closed and the matter was being argued. Really speaking

that offer should have never been entertained or dealt with by the Arbitral Tribunal. The Arbitral Tribunal would have been fully justified in rejecting the offer made at belated stage. The offer should have been rejected by the Arbitral Tribunal because it was an offer which was incapable of being accepted without there being any evidence on record and the offer was made at the stage when the evidence was closed and therefore, it was not possible to the Arbitral tribunal to enquire into the genuineness or otherwise of the offer. In my opinion, the offer made by the petitioner was also not genuine, bonafide and honest, as the defence raised by the petitioner to claim no.3 was dis-honest, similarly the offer made by the petitioner was also dis-honest. In this view of the matter therefore, in my opinion, it cannot be said that the Award made by the Arbitral Tribunal results in any failure of justice. In my opinion, therefore, the Award made by the Arbitral Tribunal against claim no.3 cannot be interfered with.

5. So far as the Award made by the Arbitral Tribunal against claim nos.5 and 6 is concerned, in my opinion, there is basic infirmity in the Award. Admittedly, the claim nos.5 and 6 were towards the cost of additional work carried out by the respondent. It is also an admitted position before me that this payment of additional work has been dealt with by the minutes of meetings dated 23.6.2000. Two paragraphs from the minutes of meeting dated 23.6.2000 are relevant, they read as

under:-

> "M/s.Futura Concepts requesting to following the above schedule and complete the Project, and the above extra amount can be adjusted the extra work done by Futura after completing the Project.
>
> SICCL agreed to pay extra items on actual cost basis for (a) Granite flooring difference (b) False ceiling (extra) (c) civil and other structural work (d) Extra Quantum of water body, but not on area increased basis (i.e.3,000/sft.)"

Thus, the agreement between the parties was that the respondent would be paid for this extra work done on actual cost basis. Obviously, therefore, in order to claim amount for this work, the burden was on the respondent to produce evidence on record to show what was the actual cost incurred by the respondent for carrying out this work. Perusal of the Award shows that in paragraph 41 of the Award the Arbitral Tribunal has also noted that the parties had agreed by the minutes dated 23.6.2000 that the respondent was to be paid for this work on actual cost basis. It is admitted position on record that the respondent has neither produced any bills nor any evidence which can be termed as a primary evidence which will establish what was the

actual cost incurred by the respondent in carrying out the work. The arbitral tribunal has awarded this claim by making following observation:-

> "In the Written Statement, the Respondent has not raised the issue of rate at which the Claimant has made this claim. There being no other evidence on record to show that the rates at which the claimants has made his claim are not correct, we award this claim to the Claimant and hold that the Respondent is liable to pay the same to the Chairman."

Perusal of the above quoted portion of the Award shows that the Arbitral Tribunal has awarded this claim merely because the rate at which the payment was claimed in the statement of claim by the respondent was not denied by the petitioner. In my opinion, firstly there was an obligation on the respondent to lead evidence to establish what was the actual cost incurred by it for carrying out the work and secondly in view of the provisions contained in section 25(b) of the Arbitration and Conciliation Act,1996, merely because the rate was not denied by the petitioner, the Arbitral Tribunal could not have made the Award for that reason. Perusal of the provisions of Section 25(b) of the Act show that mere failure of the respondent to file statement of

defence in accordance with sub-section (1) of Section 23 of the Act does not permit the Arbitral Tribunal to treat it as an admission of the allegations made by the claimant, and therefore, even if there is no denial on the part of the respondent, the claimant has still to lead evidence and establish its claim. Perusal of the provisions of Section 23(1) of the Arbitration and Conciliation Act shows that there is duty casts on the respondent to state his defence in respect of particulars contained in the statement of claim. A combined reading of sub-section (1) of Section 23 and section 25(b) of the Act shows that merely because the particulars given in the statement of claim are not replied to by the respondent, the arbitral tribunal cannot treat that the allegation has been admitted. The claimant would still be under a duty to prove the allegation. In my opinion, therefore, the Award made by the Arbitral Tribunal against claim nos.5 and 6 is the Award made in breach of the obligation casts by clause (b) of Section 25 of the Act, as also contrary to the terms of the contract between the parties which provided that the respondent would be entitled to payment of actual cost incurred by it. In the absence of proof of what is the actual cost incurred by the respondent, the Arbitral Tribunal could not have made such an Award. It is to be seen that sub-section (3) of Section 28 of the Act casts duty on the Arbitral Tribunal to decide the disputes in accordance with the terms of the contract. If the terms of the contract between the parties made the respondent entitled to only actual cost

incurred by it, without the respondent establishing what is the actual cost incurred by it, the Arbitral Tribunal could not have made the Award. In the result therefore, the petition succeeds in part. The Award made by the Arbitral Tribunal against claim nos. 5 and 6 is set aside. The petition is disposed of. There shall be no order as to costs.